IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

v.

Y.C.T., MINOR

Defendant.

SEALED

Criminal No. 13-235 (FAB)

REPORT AND RECOMMENDATION

FACTUAL AND PROCEDURAL BACKGROUND

Y.C.T., a juvenile defendant, was arrested on April 30, 2013. An Information was filed that day, charging Y.C.T. with a violation of Title 18, United States Code, Section 2119(2), that is, that on or about April 29, 2013, with the intent to cause serious bodily harm, he took a motor vehicle, a black colored 2001 Mitsubishi Nativa bearing license plate EIJ264, that had been transported, shipped, and received in interstate or foreign commerce from E.J.P.C. and A.P.R., by force, violence, and intimidation, resulting in serious bodily injury, that is, the sexual assault of A.P.R. and a head injury as to E.J.P.C., that caused extreme physical pain; and with a violation of Title 18, United States Code, Sections 2 and 924(c)(1)(A), that is, he did knowingly aid and abet other individuals who brandished and carried a firearm, that is, a black shotgun, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, carjacking. (Docket Nos. 3, 12, 13).

The United States Attorney also certified on April 30, 2013 that this court's jurisdiction over the defendant as a juvenile committing acts of juvenile delinquency is proper in accordance with Title 18, United States Code, Section 5032 of the Juvenile Justice and Delinquency Prevention Act (the "Act"), Title 18, United States Code, Sections 5031-42.[1] (Docket No. 4).

On May 13, 2013, the United States filed a "Motion to Transfer Proceedings Against Juvenile to Adult Criminal Prosecution." The motion states that Y.C.T. was seventeen years old when he allegedly committed an act of juvenile delinquency, and therefore is a "juvenile" for purposes of federal criminal prosecution, and moved the court to transfer the juvenile Y.C.T. for criminal prosecution as an adult, pursuant to Title 18, United States Code, Section 5032. (Docket No. 15).

On May 30, 2013, the presiding judge referred the motion to transfer proceedings to this magistrate judge for a hearing and report and recommendation. (Docket No. 18). On July 3, 2013, the presiding judge ordered disclosure of Y.C.T.'s juvenile delinquency record (Docket Nos. 39-41), and a psychological evaluation to determine his intellectual development and psychological maturity. (Docket No. 42). A psychological/neuropsychological report prepared by a court appointed expert, Dr. Jaime Grodzinski, clinical psychologist and neuropsychologist, was filed on July 29, 2013. (Docket No. 61). At a status conference held before me on August 1, 2013, the defense announced that Y.C.T. would also be evaluated by a psychologist of their choosing. (Docket Nos. 73-75). A psychodiagnostic assessment report prepared by Dr. Carol Romey, clinical psychologist, was filed on August 14, 2013. (Docket No. 76).

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[1] FPD Guzman brought to the court's attention that the charge contained in the information was modified as to the type of firearm used after the U.S. Attorney first certified the case, and that the case was not certified again afterwards, and therefore the case has not been properly certified by the Attorney General. Counsel for the government argued that the amendment only corrected a typo which did not change the nature of the charges, and did not need further certification. Counsel for defense reserved the right to further raise the issue by written motion. (Trancript ("Tr.") at Docket No. 80, p. 5-6).

A hearing was held on August 20, 2013.[2] Testimony of FBI Special Agent ("S.A.") Hector Gonzalez, Mr. Daryl Cash (Bureau of Prisons ("BOP") contract specialist), and Dr. Grodzinski was heard on behalf of the government. Dania Santiago-Castillo (social worker), Efrain Afanador (social worker), and Dr. Romey testified on behalf of the juvenile. The reports prepared by Dr. Grodzinski and Dr. Romey were admitted into evidence. (Docket No. 79, Tr. p. 67). The government filed a memorandum in support of transferring the juvenile to adult status for prosecution (Docket No. 86), and defendant filed a memorandum in opposition. (Docket No. 85).

TRANSFER CRITERIA

Juvenile transfer is governed by 18 U.S.C. § 5032 of the Federal Juvenile Delinquency Act (the "Act"), 18 U.S.C. § 5031 *et seq.* Permissive transfers must meet three criteria: (1) the juvenile must be fifteen or older, (2) he or she must have committed a crime of violence had it been committed by an adult or one of the enumerated offences,[3] and (3) transfer must be in the interest of justice as determined in a transfer hearing. 18 U.S.C. § 5032. A transfer is in the interest of justice when the interest in protecting society outweighs the interest of the juvenile system in encouraging rehabilitation. United States v. Male Juvenile E.L.C, 396 F.3d 458, 461 (1st Cir. 2005). The burden is on the government to prove this by a preponderance of the evidence at a transfer hearing. United States v. A.R., 38 F.3d 699, 703 (3d Cir. 1994).

Section 5032 sets forth six factors to be considered in assessing whether it would be in the interest of justice to transfer a juvenile to adult status:

(1) the age and social background of the juvenile,

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[2] Y.C.T.'s mother and partner were present at the transfer hearing. An interpreter translated the proceedings into Spanish for them. (Docket No. 79).

[3] The list of enumerated offences consists of violations described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959) or section 922(x) or in section 924(b), (g), or (h) of Title 18. 18 U.S.C. § 5032.

(2) the nature of the alleged offence,

(3) the extent and nature of the juvenile's prior delinquency record,

(4) the juvenile's present intellectual development and psychological maturity,

(5) the nature of past treatment efforts and the juvenile's response to such efforts, and

(6) the availability of programs designed to treat the juvenile's behavioral problems.

Section 5032 requires that a transfer hearing be held, and that findings as to each of these factors be made in the record. 18 U.S.C. § 5032. In the absence of explicit statutory language specifying the weight to be given to each of the factors, the weight given to each factor is left to the court's discretion, United States v. Smith, 178 F.3d 22, 25 (1st Cir. 1999), citing United States v. Hemmer, 729 F.2d 10, 17-18 (1st Cir. 1984). The guiding principle in transfer proceedings is whether the alleged delinquent's transfer would be in the best interest of justice. Hemmer, 729 F.2d at 18. The First Circuit, and other circuit courts, have held that, in granting the government's motion to transfer a juvenile to adult status for prosecution, the district court does not need to find that each factor or even a majority of the factors weighs in favor of the prevailing party, and does not need to give equal weight to each factor, but may instead balance them as it deems appropriate. Male Juvenile E.L.C., 396 F.3d at 461 (citations and quotations omitted).

I will address each of the six factors in turn.

A. Age and Social Background of the Juvenile

Age

Y.C.T. was seventeen years and ten months old at the time of his arrest. By the date of the transfer hearing, he was already eighteen years old. Current age is important in determining whether juvenile type rehabilitation programs would be appropriate for the juvenile. United

States v. Nelson, 68 F.3d 583, 589 (2nd Cir. 1995). The more mature the juvenile becomes, the harder it is to reform the juvenile's values and behavior. Id. The closer a juvenile is to age eighteen, the more this fact might appropriately weigh in favor of transfer. United States v. A.R., 203 F.3d 955, 961 (6th Cir. 2000).

Social Background

Social background factors may include supportiveness of family environment, strength of family relationships, and conduciveness to supervision. United States v. Juvenile K.J.C., 976 F. Supp. 1219, 1225 (N.D. Iowa 1997). The absence of a strong family environment would probably make rehabilitation prospects for the juvenile unlikely. United States v. Juvenile No. 1, 118 F.3d 298, 308 (5th Cir. 1997).

Y.C.T.'s parents, who are separated, and his siblings live in Florida. (Tr. 26, 69, 146). Both his parents were convicted for controlled substances violations and sentenced to probation. His father is a paraplegic due to a work accident (Tr. 118), and left the family in Florida to come to Puerto Rico to take care of his ailing mother without the court's permission when Y.C.T. was nine years old and as a consequence lost his and his family's social security benefits. After his father left, Y.C.T. became rebellious, had problems in school, and left school in the sixth grade at the age of thirteen. His mother, a trained nurse that does not work, moved the family back and forth between Puerto Rico and Florida. Once Y.C.T.'s grandmother died, his father returned to Florida, and was arrested for violation of his probation conditions. (Tr. 140-141).

At the time of the commission of the offence, Y.C.T. was living in Puerto Rico with his seventeen year old consensual partner, who is six months pregnant, and was being supervised by a twenty-five year old female cousin. (Tr. 26, 139). Y.C.T. expressed to Dr. Grodzinski that he is concerned that he will not be able to help his girlfriend. (Tr. 69). Y.C.T. also spoke to Dr.

Romey about his consensual partner. They have been together for a year and a half or more, she has a one-year-old son that calls him father, and they had plans to live in Florida as a family unit. Dr. Romey called it "children raising children." (Tr. 139-140). Dr. Romey found Y.C.T. to be "very young, home oriented, family oriented, very sheltered, a little bit over socialized maybe, and very protected kid." (Tr. 143).

B. Nature of the alleged offence

For purposes of the transfer hearing, "the court may assume the truth of the government's allegations regarding the defendant's commission of the crime." United States v. McQuade Q., 403 F.3d 717, 718, n. 1 (10th Cir. 2005) (quoting United States v. Anthony, 172 F.3d 1249, 1251, n. 1. (10th Cir. 1999)). When a crime is particularly serious, the court is justified in weighing this factor more heavily than the other statutory factors. See A.R., 38 F.3d at 705.

Y.C.T. was charged with a violation of Title 18, United States Code, Section 2119(2), that is, that on or about April 29, 2013, with the intent to cause serious bodily harm, he took a motor vehicle, a black colored 2001 Mitsubishi Nativa bearing license plate EIJ264, that had been transported, shipped, and received in interstate or foreign commerce from E.J.P.C. and A.P.R., by force, violence, and intimidation, resulting in serious bodily injury, that is, the sexual assault of A.P.R. and a head injury as to E.J.P.C., that caused extreme physical pain; and with a violation of Title 18, United States Code, Sections 2 and 924(c)(1)(A), that is, he did knowingly aid and abet other individuals who brandished and carried a firearm, that is, a black shotgun, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, carjacking. (Docket Nos. 3, 12, 13). The nature of the offence is a serious crime of violence as certified by the United States Attorney.

S.A. Gonzalez testified at the transfer hearing about the facts in this case and Y.C.T.'s participation in the commission of the offence. Based on his testimony, Y.C.T. actively participated in the commission of a crime of violence, a carjacking, was carrying a firearm during the commission of this offence,[4] drove the carjacked vehicle, demanded money from the victims, hit the male victim in the head various times and inflicted a wound, threatened to kill the male victim, who later decided to throw himself from the moving vehicle, sexually assaulted the female victim while pointing a gun at her, threatened to kill her if she did not have sex with him, forced her to take her clothes off and perform oral sex on him, and offered her drugs.[5] (Tr. p. 11-23). Defendant admitted experimenting with drugs at the age of ten and having consumed marihuana and Xanax the day of the commission of the charged offence.

C. Nature and Extent of Juvenile Delinquency Record

The lack of a prior record of delinquent acts weighs in favor of treating a defendant as a juvenile because it increases the likelihood of rehabilitation by the time he reaches twenty-one years of age. See United States v. M.L., 811 F. Supp. 491, 495. (C.D. Cal. 1992). On the other hand, juvenile delinquency records that reflect more serious and frequent delinquency episodes can weigh in favor of transfer. United States v. M.H., 901 F. Supp. 1211, 1215 (E.D. Tex. 1995).

Y.C.T. has a prior juvenile delinquency record in the state of Florida. At ten years old, he was convicted of criminal mischief (for breaking a window in a house when he was nine years old on February 7, 2006, and sentenced to a term of probation of six month. (Docket No. 60, Exhibit 1, p. 6-7). In 2007, at age eleven, he was charged with affray but the victim filed a waiver of prosecution. (Id., p. 11). In 2008, he was convicted of resisting an officer without violence (misdemeanor) and sentenced to probation. That same year, at age twelve, Y.C.T. was charged with resisting an officer with violence (felony) and without violence (misdemeanor), and disorderly conduct. (Id., p. 13). At age seventeen and ten months, Y.C.T. was charged with the instant offence. S.A. Gonzalez also testified that there is an outstanding arrest warrant for assault charges. (Tr. 27).

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[4] S.A. Gonzalez also testified that it was later determined that the handgun that Y.C.T. used during the carjacking was a toy. (Tr. 36, 42).

[5] Y.C.T. challenged how SA Gonzalez obtained this information. (Tr. 33-35). At the transfer stage, I do not need to examine the strength of the government's evidence, as I must assume the truth of the alleged offence. (Tr. 33-35)

D. Juvenile's Present Intellectual Development and Psychological Maturity

The higher the intellectual development and psychological maturity of the minor, the more probable is that he will be transferred to adult proceedings. United States v. J.D., 525 F. Supp. 101, 104 (S.D.N.Y. 1981).

Dr. Grodzinski interviewed Y.C.T. on July 22, 2013 at the Juvenile Bayamon Detention Center. At the time of the evaluation, Y.C.T. was already eighteen years old. Dr. Grodzinski performed psychological and neuropsychological tests,[6] and found Y.C.T. to be oriented and cooperative, showed appropriate concentration and level of insight, and was able to follow verbal instructions without difficulty. His thought process was concrete, organized, coherent, and oriented to problem solving. He is bilingual, and fluent and well-articulated in the spoken language. He was open to disclosing his personal information. He showed no evidence of hallucinations or delusive thought, and denied suicidal or homicidal ideation. He has difficulties related to spelling and arithmetic due to his limited formal seventh grade education. Y.C.T's IQ is at an average level. (Tr. 67-84). Dr. Grodzinski found that Y.C.T. has no mental health issues or diagnosis, and no personality disorders (Tr. 82), and assessed that Y.C.T. could, on a daily basis, understand, connect information, show appropriate levels of insight, and make appropriate

[6] Dr. Grodzinski performed a Neurobehavioral and Mental Status Examination, Dominance and Laterality Test, Rey Auditory Verbal Learning Test, Rey Osterrieth Complex Figure Test, Benton Visual Memory Test, Aphasia Screening Test, Trail Making A & B Test, Non-Verbal Intelligence Test 4 (IQ estimation), EIWA-III ("*Escala de Inteligencia Wechsler para Adultos III*"), Judgment Line Orientation Test, Beck Depression Inventory, and Beck Anxiety Inventory. (Docket No. 61-1, p.1).

decisions. (Tr. 80). Dr. Grodzinski concluded that Y.C.T. has an average intellectual development and psychological maturity. (Tr. 83, Docket No. 61-1 p. 7).

Dr. Romey also interviewed Y.C.T. at the Bayamon Detention Center, and his mother in order to get background information about his schooling, interventions, and family dynamics. Dr. Romey stated that she had Dr. Grodzinski's evaluation available so as not to duplicate tests.[7] Y.C.T.'s formal education took place in schools in Puerto Rico and Florida. His mother had him placed in a special education program for two years, then in a regular program, and back to special education. Y.C.T. completed the sixth grade, but refused to go to school in the seventh grade after he was beat up by a gang in a school bus in Florida. He is a type two bilingual (not fully fluent in English or Spanish). Dr. Romey described him as a very young eighteen year-old man with adolescent issues and no history of mental disease, a bit dependent and submissive, but also angry and upset. He does not handle stress well, lacks self-confidence, and has a bit of anxiety and depression. Y.C.T. is not traumatized by his life circumstances, nor has he been victimized to the point of being unable to recover. She found no indication of violence potential (suicidal, homicidal, or impulsivity) in his test scores. He is a peacemaker and a follower that goes by the rules, and knows the difference between good and bad behavior. Dr. Romey assessed that he has the intellectual ability or potential to benefit from the proper treatment and supervision in treating his adolescent issues, that he needs academic skills (finish school), and that he is the type of young man meant to be kept in the juvenile system where people skilled in adolescents could help him mature. (Tr. 134-151).

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[7] Dr. Romey performed the Rorschach psychodiagnostic plates test (ink blot test), Rotter Incomplete Sentence Blanks, MMPI for adolescents, and Millon Adolescent Clinical Inventory. (Docket No. 76-1, p. 2).

E. Nature of Past Treatment Efforts and Juvenile's Response to Such Efforts

Dania Santiago Castillo, social worker at the Bayamon Juvenile Detention Center that supervised Y.C.T. for two months, testified that the center provides recreational and educational services, and that Y.C.T's behavior at the institution was adequate and as expected. He followed the institution's rules and treated people with respect. He responded adequately to the services provided at the center. He was not a troublemaker. Ms. Santiago further testified that special privileges were obtained through good behavior, and by being cooperative and respectful towards peers and personnel, and that Y.C.T. received such privileges. (Tr. 87-92). Ms. Santiago opined that Y.C.T. would do well in the free community if he undergoes a structured process and gets the proper direction and tools. (Tr. 93).

Efrain Afanador testified that Y.C.T. participated in an individualized service plan and, while under Ms. Santiago's and his supervision, has remained stable, is cooperative with the staff, and has had no incidents with other inmates or the staff. He testified that Y.C.T. has the potential to develop within a structured environment with supervision. (Tr. 101-105).

In addition, Dr. Romey's report states that Y.C.T. was diagnosed with Attention Deficit Disorder with Hiperactivity and received psychological treatment on a monthly basis for one year. (Docket No. 76-1, p. 3).

F. Availability of Programs Designed to Treat Juvenile's Behavioral Problems

The court should consider the availability of programs for similarly-aged juveniles, how the juvenile in the instant case would fit into the program, and how long he is to remain detained. Nelson, 68 F.3d at 590-91. The facility must provide the juvenile with his basic necessities, plus counseling, education, training, and medical care, including necessary psychiatric or psychological treatment. United States v. Patrick V., 359 F.3d 3, 12 (1st Cir. 2004).

Mr. Cash testified that rehabilitation programs in juvenile and adult facilities are similar. Both offer anger management, life skills, thinking errors and, if appropriate, sex offender treatment. However, staff-to-offender ratio (one to eight) is more favorable in juvenile rehabilitation programs than in adult programs (one to 250), and treatment programs in juvenile facilities are mandatory and individualized, whereas in the adult programs participation is optional. The adult programs offer a greater variety of vocational training, such as carpentry, masonry, plumbing, welding, or culinary skills, geared to helping the inmate obtain a job once released, while vocational training in the juvenile programs is limited, participation is earned through good behavior, and some programs may not even offer vocational training. (Tr. 48-61).

Mr. Afanador also testified about juvenile programs in the local system. Mr. Afanador would have liked to place Y.C.T. in a National Guard inmate program available for a select group of juveniles that meet certain adjustment and progress criteria. Upon questions by the government, Mr. Afanador stated that he is aware that Y.C.T. is not being processed in state jurisdiction, that he has not worked in the federal prison system and has no knowledge of available federal offender programs, and acknowledged that Y.C.T. would benefit from a federal adult prison program that provides supervision and structure. (Tr. 105-110).

Dr. Romey testified that a juvenile's needs and psychological development are different from an adult's, and juvenile institutions are designed to treat the needs of a juvenile with Y.C.T.'s psychological profile. Placing Y.C.T. in an adult institution would deprive him of years of development and rehabilitation. A one-to-eight staff to inmate ratio allows for a therapeutic community that simulates a family unit in terms of counseling, which is not possible when the ratio is one to 250. She understands that he should stay at the juvenile level "to keep growing up." (Tr. 142-145).

ANALYSIS

Transfer hearings closely parallel competency hearings in that neither resolve questions of substantive guilt or innocence, but address "'whether a defendant should be exempted from criminal prosecution because he falls within a category of persons, who, in the eyes of the law, are not viewed as fully responsible for their acts.'" O'Brien v. Marshall, 453 F.3d 13, 17 (1st Cir. 2006), quoting A.R., 38 F.3d at 703. The Act's remedial scheme focuses primarily on the juvenile's circumstances, particularly his current prospects for rehabilitation outside the adult criminal justice system, "and only secondarily on the offender's age at the time of the alleged offense." United States v. Welch, 15 F.3d 1202, 1206, n. 4 (1st Cir. 1993).

Section 5032 establishes three criteria that must be met for a permissive transfer to adult prosecution. As to the first criteria, Y.C.T. was fifteen years old or older at the time of the commission of the offence. He was seventeen years old and ten months. This case also meets the second criteria. Y.C.T. is charged with committing what would be a crime of violence if committed by an adult, a carjacking that resulted in serious bodily injury.

In order to determine whether this case meets the third criteria, that the transfer be in the interest of justice, this court must examine the factors contained in Section 5032. There is no precise language in 18 U.S.C. § 5032 assigning the weight given to the above factors. The guiding principle in transfer proceedings is whether the alleged juvenile delinquent's transfer would be in the interest of justice. See United States v. Hemmer, 729 F.2d 10, 18 (1st Cir. 1984). Y.C.T. is charged with a carjacking that resulted in serious bodily harm to two victims, and played a major role in the offence. He was then two months short of being eighteen years old, and has since passed his eighteenth birthday. As charged, he drove the stolen vehicle, physically assaulted the victims, and appears to have been a willing participant in the events. Even though the firearm he was carrying turned out to be a toy gun, the victims thought it was real, and another participant in the offence did carry a real firearm, for which Y.C.T. is also being charged.

Having considered all the evidence presented, the nature of the offence, the age of Y.C.T., both at the time of the offence and at the time of the transfer hearing, along with the other factors, it is unlikely that Y.C.T. will be rehabilitated by his twenty-first birthday. Although there is some evidence that he received some psychological treatment while he was still living with his mother, and that he has benefitted from the counseling offered at the local juvenile institution he is now at and may benefit from other programs available in federal juvenile institutions, he is already eighteen years old, and the time left for possible rehabilitation in a juvenile facility is less than three years. He does not have a stable adult family support system. He has a prior juvenile record that reflects various confrontations with law enforcement officers. Living separate from any adult supervision and his previous brushes with the law suggest that he does not take supervision well. He has the intellectual and psychological maturity of an average person that knows the difference between right and wrong, and the nature of the charged offence and the agent's proffer of the events that occurred that night depict a person that purposely and knowingly carried out a crime of violence that did cause serious bodily harm. Processing him as a juvenile will not advance the interest of justice.

Therefore, this case meets the three criteria for a permissive transfer of the juvenile to adult status for prosecution.

CONCLUSION

For the foregoing reasons, I recommended that juvenile Y.C.T. be transferred to adult status.

This report and recommendation is filed pursuant to 28 U.S.C. 636(b)(1)(B) and Rule 72(d) of the Local Rules of this Court. Any objections to the same must be specific and must be filed with the Clerk of Court **within fourteen days** of its receipt. Failure to file timely and specific objections to the report and recommendation is a waiver of the right to appellate review. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Davet v. Maccorone*, 973 F.2d 22, 30–31 (1st Cir. 1992); *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988); *Borden v. Sec'y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987).

IT IS SO RECOMMENDED.

In San Juan, Puerto Rico, this 18th day of October, 2013.

s/Bruce J. McGiverin
BRUCE J. MCGIVERIN
United States Magistrate Judge